No. 85-1233

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

INTERNATIONAL PAPER COMPANY,

Petitioner,

v.

HARMEL OUELLETTE and LILA OUELLETTE, CLIFTON BROWNE and EDLA BROWNE, ALDEE PLOUFFE and SHIRLEY PLOUFFE, individually, on behalf of themselves, and on behalf of all similarly situated plaintiffs, H. VAUGHN GRIFFIN, SR., ARDATH GRIFFIN, ALAN THORNDIKE and ELLEN THORNDIKE, WESLEY C. LARRABEE and VIRGINIA LARRABEE, F. ALFRED PATTERSON, JR., and LOIS T. PATTERSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

ROY L. REARDON
Counsel for Petitioner
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

Of Counsel:

ALBERT X. BADER, JR.
SIMPSON THACHER & BARTLETT
(a partnership which includes professional corporations)
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

JAMES W. B. BENKARD
JOHN R. D'ANGELO
DAVIS POLK & WARDWELL
1 Chase Manhattan Plaza
New York, New York 10005
(212) 530-4000

DINSE, ERDMANN & CLAPP
209 Battery Street
P. O. Box 988
Burlington, Vermont 05402
(802) 864-5751

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Petitioner International Paper Company ("IPCo")* respectfully submits this reply brief in response to the brief of Respondents in opposition and in further support of its petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit

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* A listing naming all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of International Paper Company is on page i of the Petition for a Writ of Certiorari, filed with this Court on January 22, 1985.

which affirmed *per curiam* the decision of the United States District Court for the District of Vermont (Honorable Albert W. Coffrin, U.S.D.J.), *Ouellette* v. *International Paper Co.*, 602 F. Supp. 264 (D.Vt. 1985). In that decision, the District Court denied IPCo's motion to dismiss Respondents' first cause of action on the ground that Vermont had jurisdiction over a flow of effluent into interstate waters that emanated from a source located in New York.

ARGUMENT

The central contention of Respondents' brief in opposition is that there is no direct conflict between the decisions of the courts below and the decision of the Seventh Circuit in *Illinois* v. *Milwaukee*, 731 F.2d 403 (7th Cir.), as amended, nos. 77-2246 and 81-2236 (7th Cir. May 29, 1984), cert. denied sub nom. *Scott* v. *City of Hammond*, 105 S. Ct. 979 (1985) (*"Milwaukee III"*). As is clear from Respondents' own papers, however, and as the Vermont District Court acknowledged, 602 F. Supp. at 268 (A11),* these two decisions represent diametrically opposed approaches to and interpretations of this Court's prior decisions and of the Federal Water Pollution Control Act ("FWPCA"). The courts in both cases were presented with the identical issue and reached opposite conclusions, not because of differences in the nature of the suits or of the parties, but because of differences in each court's understanding of the interrelationship between the savings clause of the FWPCA and this Court's decisions, which held, in *Illinois* v. *Milwaukee*, 406 U.S. 91 (1972) (*"Milwaukee I"*), that state jurisdiction over the discharge of effluent into interstate waters was "preempted" by federal common

* "A" citations are to the Appendix contained in Petitioner's Petition for Certiorari.

law, and, in *Milwaukee* v. *Illinois*, 451 U.S. 304 (1981) (*"Milwaukee II"*), that federal common law regulation of discharges into interstate waters was superseded by the regulatory scheme embodied in the FWPCA.*

Respondents attempt before this Court to distinguish the present case from *Milwaukee III* on the basis that *Milwaukee III* involved a suit by one state against quasi-sovereign political subdivisions of a second state, whereas the present action is one by private landowners against a private business enterprise, even though the State of Vermont is joined as a member of the plaintiff class. Respondents seek to distinguish between a state using its laws to regulate and control effluent discharged by a sister state's political subdivisions, and private landowners using one state's nuisance laws to seek injunctive relief and compensation for damages allegedly caused by the discharge of effluents into interstate waters by a source located in another state. They read this Court's "preemption" analysis in *Milwaukee I* as nothing more than a necessary expedient to provide Illinois with a forum in which to bring a nuisance suit directed at the City of Milwaukee and other instrumentalities of Wisconsin (Respondents' Brief, p. 6).**

* Respondents (Brief, p. 8) read this Court's remark in *Milwaukee II* that it is not possible for federal and state common law nuisance jurisdiction to coexist, 451 U.S. at 314, n. 7, as supporting their notion that state common law nuisance jurisdiction over discharges in interstate waters survived *Milwaukee I*. This argument clearly misconstrues *Milwaukee II*. *See Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 n. 13 (1981).

** Respondents also read this Court's warning in *Milwaukee II*, 451 U.S. at 316-17, against misconstruing the "preemption" analysis it used there to hold that federal common law was "preempted" by the FWPCA as an appropriate standard to determine whether state law had been preempted by federal law, as indicating that *Milwaukee II* sustains the continued existence of state common law with regard to discharges into interstate waters. Respondents' Brief, pp. 7-8.

Despite Respondents' claims, this Court's prior decisions make clear that preemption analysis does not come into play "only where interstate pollution disputes arise between quasi-sovereign entities, concerning attempts by one to regulate the conduct of the other or its citizens." (Respondents' Brief, p. 13). As discussed in the Petition, pp. 17-18, this Court has ruled that federal law governs interstate water disputes regardless of the nature of the parties. *See Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938); *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 n. 13 (1981); *see also* cases cited in Petition, p. 17, at footnote *. As this Court observed in *Milwaukee I*, "it is not only the character of the parties that requires us to apply federal law." 406 U.S. at 105 n. 6. There is nothing in either *Milwaukee I* or *Milwaukee II* to suggest that federal law is only applicable to the regulation of the use of interstate waters where the litigants are sovereign entities rather than private parties, and such a conclusion cannot be reconciled with the reasoning behind these decisions.

Nor did the Seventh Circuit hold in *Milwaukee III* that federal law should apply only because the case involved quasi-sovereign entities and states disagreeing over the use of interstate waters. Instead, *Milwaukee III* recognized that both the statute and this Court's precedents make the regulation of interstate waters a matter of federal jurisdiction so that state common law regulation had to give way. As the Seventh Circuit observed,

> "Given the logic of *Milwaukee I* and *Milwaukee II*, we think federal law must govern in this situation except to the extent that the 1972 FWPCA (the governing federal law created by Congress) authorizes resort to state law." 731 F.2d at 411.

While the Seventh Circuit fully understood that the scheme of the FWPCA embodied both federal and state regulation of sources of pollution, it concluded that FWPCA §§ 1365(e) and 1370 could not have "saved" jurisdiction of an impacted state over interstate waters, because that jurisdiction had been repudiated by *Milwaukee I* before the FWPCA was enacted. 731 F.2d at 413-14.*

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* The Seventh Circuit went on to observe, however, that

> "[t]his provision [§ 1365(e)] may well preserve a right under statutes or the common law of the state within which a discharge occurs (State I) to obtain enforcement of prescribed standards or limitations. . . . However, it seems implausible that Congress meant to preserve or confer any right of the state claiming injury (State II) or its citizens to seek enforcement of limitations on discharges in State I. . . . 731 F.2d at 414."

While the Seventh Circuit dismissed the various actions, it specifically upheld the applications of Wisconsin or Indiana law by "state or federal courts in one of those states at the suit of out of state parties affected by discharges in that state." 731 F.2d at 411 n. 3. Respondents contend (Respondents' Brief, p. 9) that Petitioner argues that Respondents can only sue in New York courts and under New York law and that Petitioner is thereby "asking the courts to develop a new common law rule of subject matter jurisdiction". It is not Petitioners who have suggested "a new common law of subject matter jurisdiction". Rather, the Seventh Circuit inferred from the language of the FWPCA an intent of Congress, which it (and the Solicitor General, see Brief for the United States in *Milwaukee III*, p. 12) thought to be consistent with the comprehensive regulatory scheme it enacted, which assigned a significant regulatory role to each state, as well as to the federal EPA, to regulate sources of pollution *within its borders*. 731 F.2d at 411. The Seventh Circuit understood that the states lacked such jurisdiction over interstate waters in view of *Milwaukee I*. We have discussed, Petition at pp. 20-21, and summarize at pp. 6-9 *infra*, the compelling policy reasons which support the Seventh Circuit's reasoning. Although the Vermont district court and the Second Circuit were not persuaded by the reasoning of the Seventh Circuit, there is nothing novel in a statutory scheme which accords to the courts of one state (including federal courts sitting in diversity cases) the responsibility to exercise an essentially local regulatory jurisdiction over pollution sources

(footnote continued on following page)

This holding, which is supported by both the statute and the case law, represents a very different analysis of the FWPCA and the role of state law than that employed by the Second Circuit and adopted by Respondents. It is this difference between the two cases, and not an immaterial distinction in the nature of the parties involved, that is crucial, and it is this difference that requires this Court's resolution.

Respondents' second attempt to create a distinction between *Milwaukee III* and the instant case, which is based on the nature of the relief sought, is similarly flawed and equally inconsistent with what the Seventh Circuit understood to be the holdings of this Court in *Milwaukee I* and *Milwaukee II*, as well as the effect of the FWPCA. Respondents contend that the common law of nuisance, as applied to private disputes, does not "implicate the regulatory powers of the states in which the parties are located," *Ouellette* v. *International Paper Co.*, 602 F. Supp. 264, 271 (D. Vt. 1985), but instead "is designed primarily to redress a plaintiff's particular injury." *Id.* at 271-72. In real terms, however, this distinction is meaningless, as this Court has recognized in other "preemption" contexts. *See, e.g., San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959) ("[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief."); *Garner* v. *Teamsters Union*, 346 U.S. 485, 492-97 (1952).

The relief sought here—more than a hundred million dollars and injunctive relief that might force the reconstruc-

(footnote continued from preceding page)

within its boundaries, while withholding such authority from courts in other states. *See* FWPCA § 1365(c) which requires that suits for enforcement under the Act be brought in the judicial district in which the source is located. (A52).

tion or shutdown of Petitioner's mill—would plainly interfere with the regulatory authority of the state where the mill is located. A state's efforts to regulate a source located within its boundaries which discharges into interstate waters could be rendered meaningless if courts and juries in each state contiguous to those waters could impose new and possibly conflicting requirements in the form of equitable relief or damage awards of sufficient magnitude to require process changes or even the termination of the discharger's operations.*

Respondents finally seek to suggest that no immediate conflict is presented for resolution in this case because differences between the common law of nuisance in New York and Vermont are minimal, and contend that the sole basis for Petitioner's appeal is to avoid bias and local prejudice on the part of Vermont federal courts. The issue presented in this case is whether Vermont has legislative or judicial jurisdiction over Respondents' claims. While Respondents' desire to try their claims before a Vermont jury

* This conclusion does not imply that a state or its citizens are powerless to protect their own interest in discharges from out-of-state sources. Numerous provisions in the FWPCA ensure a state ample opportunity to participate in the permitting process. *See, e.g.*, § 1341(a)(2) (A36-37); § 1342(b) (A42-45), and the Seventh Circuit's decision carefully protects the rights of other states and their citizens to sue in the courts of the source state under the laws of that state, as well as under the federal statute. As the Seventh Circuit recognized, the regulatory scheme embodied in the FWPCA supports the legislative jurisdiction of the state where a source is located to adopt more stringent requirements than are directly imposed by federal law, and also endorses the jurisdiction of the courts sitting in the state where the source is located to enforce that state's regulatory requirements, whatever their basis. This fact undoubtedly influenced the Seventh Circuit in its decision to sustain the legislative and judicial jurisdiction of the source state. The difference between the Seventh Circuit and the Second Circuit is primarily over the question whether Congress gave any such sanction to the exercise of regulatory enforcement power by states other than the source state.

in a Vermont district court and the implications of possible bias with which such an arrangement is fraught are obvious factors which bear upon this Court's—and Congress'—determination how best to preserve federal principles in regulating the use of interstate waters, the controversy here does not reduce itself to the simple question Respondents posit. The ultimate question is what Congress did when it enacted the FWPCA. The alleged similarity of the nuisance law of New York and Vermont is hardly an acceptable predicate to determine whether or not Vermont's common law may appropriately be applied to a source of effluent located in New York, and nothing in this Court's decisions or in the FWPCA suggests that it is an appropriate criterion in this case.

More important, if the Second Circuit is correct, a facility located in one state which discharges into an interstate body of water may be sued in every state on which that body of water touches, under the potentially conflicting law of each state and the possibly conflicting outcomes of suits in each state, Petition, pp. 20-21. Such a result places Petitioner (and others like it) in the untenable position of being subject to regulation, through statute and case law, not only by the EPA and the state in which it is located but also by all states with borders contiguous with the interstate bodies of water into which its discharges are made.

CONCLUSION

Despite Respondents' attempts to distinguish *Milwaukee III* and the decision below, a direct conflict exists between the two federal courts of appeal that have confronted and examined the question whether, in spite of *Milwaukee I*, the FWPCA authorizes states or their citizens to bring an action in their own courts under their own laws against

a source located in another state. This conflict concerns an issue of considerable importance, both to Petitioner and to all other entities that discharge into interstate waters, that is likely to arise repeatedly. Petitioner submits that this case is an appropriate vehicle for the Court to resolve that important federal question.

Respectfully submitted,

ROY L. REARDON
Counsel for Petitioner
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

Of Counsel:

ALBERT X. BADER, JR.
SIMPSON THACHER & BARTLETT
(a partnership which includes
professional corporations)
One Battery Park Plaza
New York, New York 10004

JAMES W. B. BENKARD
JOHN R. D'ANGELO
DAVIS POLK & WARDWELL
1 Chase Manhattan Plaza
New York, New York 10005

DINSE, ERDMANN & CLAPP
209 Battery Street
P. O. Box 988
Burlington, Vermont 05402
(802) 864-5751